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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/913,339	01/16/2002	Jose Duez	28944/37661	8636
4743	7590	05/23/2005	EXAMINER	
MARSHALL, GERSTEIN & BORUN LLP 233 S. WACKER DRIVE, SUITE 6300 SEARS TOWER CHICAGO, IL 60606			PRUNNER, KATHLEEN J	
			ART UNIT	PAPER NUMBER
			3751	

DATE MAILED: 05/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/913,339	DUEZ ET AL.	
	Examiner	Art Unit	
	Kathleen J. Prunner	3751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 02 February 2005.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 19-47 is/are pending in the application.

4a) Of the above claim(s) 40 is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 19-39 and 41-47 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892) 4) Interview Summary (PTO-413)
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948) Paper No(s)/Mail Date. _____.
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
 Paper No(s)/Mail Date _____. 5) Notice of Informal Patent Application (PTO-152)
 6) Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 19-23, 29, 33-39, 41 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baumann et al. in view of Gueret ('143). Baumann et al. disclose a device for applying a product such as cosmetics or shaving cream (note lines 62-66 in col. 2) having the claimed features including a body (constituted by the container structure of sleeve member 1) including a reservoir constituted by inner compartment 6 (note lines 58-63 in col. 2) for the product, an application head (constituted by applicator element 8 and cover member 7) having the bristles of a brush (note lines 70-74 in col. 2) fixed on the support formed by cover member 7 having an orifice or material discharge opening 15, the application head being adaptable to the body 1 (note Fig. 1 and lines 35-38 in col. 4), and means for conveying the product from the reservoir 6 to the application head constituted by the piston member 2 and the threaded spindle 3. Although Baumann et al. disclose that a small brush or a brush can be used as the applicator element 8 (note lines 71-74 in col. 2) but fails to describe the length of the bristles forming such brushes, attention is directed to Gueret ('143) who discloses another device for applying a cosmetic product wherein the device uses an application head formed by brush bristles having a length ranging from 8 to 40 mm and preferably from 11 to 20 mm (note lines 5-10 in col. 3) in order to provide an applicator which allows the product to be applied rapidly while at the same time conveying much more product than a conventional brush such that it is possible to deposit a layer thickness greater than with a conventional brush (note lines 43-49 in col. 1). It would have been obvious to one of ordinary skill in the brush applicator art, at the time the invention was

made, to form the bristles of Baumann et al. having a length ranging from 8 to 20 mm in view of the teachings of Gueret in order to provide an applicator which allows the product to be applied rapidly while at the same time conveying much more product than a conventional brush such that it is possible to deposit a layer thickness greater than with a conventional brush. With respect to claim 20, Gueret further teaches the obviousness of using a bristle length less than 15 mm (note lines 5-10 in col. 3). With respect to claim 21, Gueret also teaches the obviousness of using a bristle length of not more than 10 mm (note lines 5-10 in col. 3). With regard to claim 22, Gueret additionally teaches the obviousness of using a bristle length that is not less than 5 mm (note lines 5-10 in col. 3). With regard to claim 23, the support formed by cover member 7 in Baumann et al. inherently forms a backing. With respect to claim 29, Gueret further teaches the obviousness of forming the brush bristles of synthetic materials or natural materials (note lines 11-20 in col. 3). With regard to claim 33, Gueret also teaches the obviousness of using a bristle diameter between approximately 15 μm and 60 μm , i.e., approximately 15/100th of a mm and approximately 60/100th of a mm (note lines 13-15 in col. 3). With respect to claim 34, Gueret additionally teaches the obviousness of using a bristle diameter between approximately 20 μm and 40 μm , i.e., approximately 20/100th of a mm and approximately 40/100th of a mm (note lines 39-41 in col. 3). With respect to claim 35, Gueret further teaches using a bristle diameter between approximately 35 μm and 40 μm , i.e., approximately 35/100th of a mm and approximately 40/100th of a mm (note lines 39-41 in col. 3). With respect to claims 36-38, although Baumann et al. fail to describe the specific density of bristles used in forming the brush applicator, nonetheless, to select a density within the claimed range would be considered mere routine experimentation to the artisan skilled in the brush applicator art determined solely by the particular material from which the bristles are made, the particular product being dispensed as well as by the particular type of coverage to be made to the applied surface and would simply be the result of optimization of the prior art teachings through routine experimentation, which is not a matter of invention, absent a showing to the contrary (see *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955), *In re Hoeschele*, 406 F.2d 1403, 160 USPQ 809 (CCPA 1969),

and MPEP § 2144.05). With regard to claim 39, Baumann et al. further disclose a cream product, such as shoe cream, and especially, a shaving cream (note lines 58-67 in col. 2), which is capable of forming foam during its application to the surface to which it is applied. With regard to claim 41, Baumann et al. also disclose that the application head is fixed to the body 1 and the body is a non-aerosol container structure or can. With regard to claim 42, Baumann et al. additionally disclose that the body 1 is integrated with the reservoir 6 (note lines 62-63 in col. 2).

3. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Baumann et al. in view of Gueret as applied to claims 19-23, 29, 33-39, 41 and 42 above, and further in view of Goncalves. It is considered that the orifice 15 in Baumann et al. constitutes a slit type of opening. Although Baumann et al. fail to disclose the materials forming the applicator head, attention is directed to Goncalves who discloses another brush type applicator in which the applicator is made of flexible plastic material which is rigid and elastically deformable (note lines 8-10 in col. 2) so that it is of simple construction and adaptable for all kinds of containers (note lines 47-49 in col. 1). It would have been obvious to one of ordinary skill in the brush applicator art, at the time the invention was made, to form the brush applicator head of Baumann et al. of flexible plastic material which is rigid and elastically deformable in view of the teachings of Goncalves in order to form an applicator head that is of simple construction and adaptable for all kinds of containers.

4. Claims 25-28, 31, 32, 46 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baumann et al. in view of Gueret as applied to claims 19-23, 29, 33-39, 41 and 42 above, and further in view of Barber, Jr. With respect to claims 25 and 27, although Baumann et al. fail to disclose the specific material forming the backing support of the brush applicator, attention is directed to Barber, Jr. who discloses another brush applicator having a backing (note from line 65 in col. 16 to line 33 in col. 17) formed by a network, i.e., a woven fabric, of polyester threads resulting from an association of weft and warp threads (note lines 13-19 and 29-30 in col. 17) in order to form a backing which is flexible and exhibits substantial

conformability to whatever surface it is being applied to (note lines 13-16 in col. 17). It would have been obvious to one of ordinary skill in the brush applicator art, at the time the invention was made, to form the backing support of Baumann et al. by a network, i.e., a woven fabric, of polyester threads having a weft and warp in view of the teachings of Barber, Jr. in order to form a backing which is flexible and exhibits substantial conformability, when in use, to whatever surface it is being applied to. With regard to claim 26, although Baumann et al. fail to disclose how the brush bristles are attached to the support backing, attention is directed to Barber, Jr. who discloses another brush applicator having the bristles attached or fixed to a backing by weaving or bonding (note lines 29-32 in col. 17). It would have been obvious to one of ordinary skill in the brush applicator art, at the time the invention was made, to form the brush of Baumann et al. by weaving or bonding in view of the teachings of Barber, Jr. in order to form a flexible, supple brush that is easily conformable, when in use, to whatever surface it is being applied to. With regard to claim 28, although Baumann et al. fail to disclose the specific material forming the backing support of the brush applicator, attention is directed to Barber, Jr. who discloses another brush applicator having a backing (note from line 65 in col. 16 to line 33 in col. 17) formed by polyester reinforced with elastomer (note lines 13-23 in col. 17) in order to form a backing which is flexible and exhibits substantial conformability, when in use, to whatever surface it is being applied to. With regard to claims 31 and 46, although Baumann fail to disclose the structure constituting the brush, attention is directed to Barber, Jr. who discloses another brush applicator wherein the brush is manufactured or formed so as to have bristles extending from a backing or base (note lines 20-24 in col. 1) in order to form the brush. It would have been obvious to one of ordinary skill in the brush applicator art, at the time the invention was made, to form the brush of Baumann et al. so that its bristles extend from a backing or base in view of the teaching of Barber, Jr. in order to manufacture a conventional type of brush. Regarding claims 31 and 46, Baumann et al. further discloses fixing the brush to at least a portion of the central surface of a base (constituted by cover member 7) adaptable to the body of the device with the base having at least one orifice 15 which allows the product to pass from the reservoir through the at least one

orifice 15 and through at least one orifice 14 of the support or backing of the brush (note Fig. 1). With regard to claim 32, Baumann et al. further disclose that the outside edge of the base 4 is rounded (note lines 20-22 in col. 2). With respect to claim 47, Barber, Jr. further teach the obviousness of forming the brush with a support constituting the backing or base.

5. Claim 30 is rejected under 35 U.S.C. 103(a) as being unpatentable over Baumann et al. in view of Gueret as applied to claims 19-23, 29, 33-39, 41 and 42 above, and further in view of Donsky. Although Baumann et al. fail to disclose from what specific material the bristles of the brush applicator are formed, attention is directed to Donsky who discloses another brush applicator in which the bristles are formed of mohair. It would have been obvious to one of ordinary skill in the brush applicator art, at the time the invention was made, to form the bristles of Baumann et al. from mohair in view of the teachings of Donsky in order to provide a brush made of natural origin to comply with ecological conservation concerns.

6. Claims 43-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baumann et al. in view of Gueret as applied to claims 19-23, 29, 33-39, 41 and 42 above, and further in view of Webster. Baumann et al. further disclose that the shaving product container structure 1 is a piston operated reservoir device. Although Baumann et al. fail to disclose that the shaving product container structure 1 can be formed with a flexible and deformable bag reservoir which is surrounded by propellant gas, attention is directed to Webster who discloses another shaving product container structure (note lines 28-30 in col. 7) in which the container structure is a pressurized container or can having a flexible and deformable bag (note lines 35-38 in col. 1 and 34-36 in col. 2) which is surrounded by propellant gas (note lines 44-51 in col. 6) and that uses a valve in order to dispense the product in controlled amounts (note lines 5-11 in col. 1) when a non-foamy gel shaving product is to be dispensed (note lines 32-37 in col. 1). It would have been obvious to one of ordinary skill in the applicator art, at the time the invention was made, to form the shaving product container structure of Baumann et al. as a can or container formed with a reservoir defined by a flexible and deformable bag surrounded by propellant gas in view of the teachings of Webster in order to dispense a non-foamy gel shaving product in controlled

amounts. With respect to claim 44, although Webster fails to describe the specific gas used for the propellant gas, to use compressed air as the propellant gas is considered to be obvious to one of ordinary skill in the applicator art especially when complying with or taking into account the environmental and ecological concerns regarding the ozone layer and atmospheric conditions. With regard to claim 45, Baumann et al. further disclose that the application head is fixed to the container; Webster further teaches the obviousness of using a valve 16 of ring or annular shape (note Fig. 1 and lines 6-9 in col. 4).

Election/Restrictions

7. Claim 40 is withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on June 2, 2003.

Response to Arguments

8. Applicants' arguments filed February 2, 2005 have been fully considered but they are not deemed persuasive.

9. In response to applicants' argument that the references fail to show certain features of applicants' invention, it is noted that the features upon which applicants rely (i.e., the capacity of the fluid or gel "to form a satisfactory foam") are not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

10. Applicants' arguments with regard to the foaming ability of Baumann et al., the primary reference, have been carefully considered. However, since the device of the Baumann et al. reference is used to apply shoe cream and, especially, shaving cream, it is considered that the fluid forming such products is capable of forming foam during its application to the shoe or face to which it is applied. The mere circular motion of applying the fluid, like any shaving brush, is

considered sufficient to cause the fluid to form foam. Foaming of a shaving product is key to its ability to wet and lubricate whiskers.

11. Applicants' arguments that the Baumann et al. and Gueret references are not of the same field have been carefully considered. However, both the Baumann et al. and Gueret references do indeed relate to same field, i.e., the field of cosmetic products (note lines 10-11 in col. 1 of Baumann et al. and lines 5-8 in col. 2, lines 12-13 in col. 2, and line 66 in col. 7 of Gueret). Hence, both references relate to the same field of endeavor.

12. In response to applicants' arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Conclusion

13. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kathleen J. Prunner whose telephone number is 571-272-4894.

15. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Justine Yu, can be reached on 571-272-4835. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

16. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Justine
JUSTINE R. YU
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3700

5/20/05

Kathleen J. Prunner
Kathleen J. Prunner

May 17, 2005